93-178

Supreme Court, U.S.
FILED
AUG 4 1993
OFFICE OF THE CLERK

No.....

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1993, Term

JOHN F. JOSEPH, Petitioner,

vs .

DISTRICT OF COLUMBIA AND UNITED STATES OF AMERICA, Respondents

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia

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John F. Joseph
13724 Lockdale Road
Silver Spring Md. 20906
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Pro Se

41 pp

Questions Presented For Review

A. Whether petitioner's case should be tried on its merits because it involves grave matters of public interest and public safety.

B. Whether denial of petitioner's access to an attorney in a matter of public interest and public safety, thus denying him meaningful access to the court by being represented by counsel in a complex case constitutes denial of procedural and substantive due process rights guaranteed by the Fourteenth Amendment of the United States Constitution.

C. Whether denial of petitioner's request to amend his complaint without explanation is an abuse of discretion by the court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia is attached as Appendix A of Appendix.

The opinion of the United States District Court for the District of Columbia is attached as Appendix B of Appendix.

Petition for Rehearing Denied issued May 6, 1993 is attached as Appendix C of Appendix.

JURISDICTION

This petition for writ of certiorari is taken from a decision rendered on March 17, 1993 by the United States Court of Appeals for the District of Columbia. A petition for rehearing was denied on May 6, 1993. This court has jurisdiction pursuant to the provisions of 28 U.S.C.S. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amend. XIV, §1.

STATEMENT OF THE CASE

This petition for writ of certiorari has been prepared with paralegal assistance. Pro Se petitioner will secure representation by a member of the bar of the Supreme Court to brief and argue this appeal.

The New York Times of March 5, 1965 (p. 43) reported:

> NATCHITOCHES, La., March 4 (UPI) a 24-inch natural gas pipeline exploded before dawn near here today and hurled sheets of fire over surrounding homes. Seventeen people were killed, nine of them children.

The United States Senate requested the Federal Power Commission (now Federal Energy Regulatory Commission) ("Commission") to investigate the accident and prepare a report since that agency is charged with the regulation of the interstate aspects of natural gas. Petitioner hold undergraduate degrees in Chemical and Metallurgical engineering from the University of Michigan and a graduate degree from George Washington University, and petitioner is employed by the Commission. Petitioner was assigned to a team who prepared technical interrogatories, reviewed responses, and prepared a response to the Congress. Petitioner also represented the Commission at meetings with the industry and state safety standards committees and

accompanied the Chairman of the Commission to congressional hearings on pipeline safety legislation. Petitioner was assigned as the technical expert to the congress during the debate on the safety bill. These efforts by the Commission resulted in the passage of The Natural Gas Pipeline Safety Act of 1968.

On May 25, 1988, a sunny and windless day, about 13:30 P.M. petitioner was proceeding in the vicinity of Farragut Square Park ("Farragut"), when a massive tree fell from Farragut across K Street, blocking four lanes of traffic and knocking him on his back. Petitioner was rendered unconscious and sustained broken bones and other severe injuries.

As an engineer, petitioner was curious as to why this tree would fall and none of the other 70 some trees in Farragut since all were exposed to the same environmental conditions.

Petitioner witnessed and photographed maintenance operations that replaced a portion of a defective water main located under the roots of the tree that fell, noting rotten roots and decayed pipe. This information has been filed in the record of this case.

In 1988, petitioner signed a contingent agreement retaining the law firm of Ashcraft and Gerel to represent him in an action against respondents. On February 12, 1991 Ashcraft and Gerel notified petitioner that they would not be filing a lawsuit on his behalf Appendix D of Appendix. With a short time remaining before the statute of limitations ran, petitioner frantically went from attorney to attorney seeking counsel. But the opinion of Ashcraft and Gerel was considered authoritative and no attorney wanted to expend the time and resources on this case. Therefore petitioner could not

obtain legal representation.

On May 1, 1991, petitioner filed a complaint in the Superior Court for the District of Columbia. This action was removed to the United States District Court when the District in August 1991 filed a Third-Party Complaint against the Federal government. On November 22, 1991, at a status conference Judge Norma Holloway Johnson asked all parties if July 13, 1992 was an acceptable trial date. Respondents asked for and were granted additional time to supplement their motions for summary judgment. Respondent asked when a ruling on summary judgment would issue. Judge Johnson replied, in February 1992. Based on that answer petitioner agreed to the July 13, 1992 trial date reasoning that if he obtained a favorable ruling he would have plenty of time to convince an attorney that his case was viable and prepare for trial.

While awaiting this ruling petitioner used his expertise developed in the Natchitoches assignment, discussed above to determine through interrogatories and requests for production of documents that 1) Respondents had been warned by Federal experts that installation of pipelines on Federal experts that installation of pipelines on Federal reservations such as Farragut would have a devastating effect on trees, not immediately but in the years ahead, 2) The U.S. has no records of what pipelines are installed under its reservations, 3) No Environmental Impact Statement or Environmental assessment was carried out with respect to these pipelines, these pipelines were installed under Farragut to save money since installation under the paved road would be more expensive, 4) The Metro subway tube that carries thousands of people each day to

this area was installed 8 inches below these lines, 5) The District has no record of leaks or failures on pipelines in D.C., 6) The pipelines under Farragut include a 24-inch and 16-inch gas main, a 20-inch, a 30-inch and a 16-inch water high pressure main all less than 2-feet below the hundreds of people who frequent the park during the noon hour and the dense traffic that use the surrounding sidewalks, 7) Respondents do not know the condition of these lines which have been in the ground for more than 60 years.

When apprised of these circumstances petitioner filed a motion to amend his complaint, attached as Appendix E of Appendix.

The plan petitioner envisioned was not of the magnitude of the U.S. District of Columbia Court supervision of the removal of trolley tracks when those tracks in D.C. were deemed a hazard, but a gentle prodding of respondents

to 1) determine what lines are under Farragut, 2) determine their condition, 3) mitigate the hazard.

That this is indeed a rational and urgently needed approach to the existing circumstances is underscored by two recent incidents, 1) The Washington Times and the Washington Post of January 14, 15, and 16, 1992 carried a news story and pictures of a blowout of a high pressure water main at 20th and L Streets N.W., one block over from the Farragut incident. A 36-inch pipe installed in 1912 "just blew up like an explosion", said Police Officer Charles Kelly who witnessed the explosion. A 25-foot-wide hole half the length of a football field was ripped in the street. Department of Public Works Director Betty H. Francis is quoted as saying, "we have a terribly old system, this was like an aneurysm!" Harry Thomas, Chairman of the D.C.

Council's Public Works Committee said "this could happen anywhere else in the city." 2). On June 29, 1993, the Washington Times and Washington Post carried a news story and pictures of an explosion reportedly caused by the rupture of a 12-inch gas main on Pennsylvania Avenue and 30th Street S.E., Washington D.C. Seven people were injured, one subsequently died. Anne Ford, who lives a block from the explosion is quoted as saying, "flames shot up two stories high, it was terrible, you couldn't see anything because of the smoke, but you could hear people hollering for help."

On May 14, 1992, petitioner received the summary judgment ruling promised to be issued in February. This motion was favorable but petitioners motion to amend his complaint was denied without any reason being given. Appendix F of Appendix.

Petitioner had marshalled tree and pipeline safety experts.

Armed with the Court's favorable ruling on summary judgment, petitioner once again made the rounds of Washington lawyers, and on June 12, 1992 successfully convinced a lawyer to take his case. This was contingent on securing a continuance. Appendix G of Appendix. There was also the matter of deposing the 20 some experts and witnesses respondents had marshalled. A June 12 motion for a continuance was denied. On July 9, 1992, petitioner received a legal note stating that the et al. party had been removed from the case. Petitioner was also notified that the U.S. had withdrawn all discovery request from the District. Petitioner filed a motion to remove the case back to the Superior Court.

REASONS FOR GRANTING WRIT

In Salahuddin v. Harris 782 F.2d 1127, the Court said dismissal of pro se lawsuits for frustration of process of litigation by pro se plaintiff is justified only when they do so deliberately, not when they do so through misunderstanding.

In Alton v. International Ass'n of Mach. 15 U.S. App. D.C. 36, the court said:

> ...where litigation involves public interest in assuring enforcement of the legislative will and, of course, constitutional mandates. A cognate "public interest" has also led in recent years to the overhaul of doctrines on matters like standing and ripeness, and to the hearing of controversies from which courts formerly refrained.

In Grochal v. Aeration Processes 797 F.2d 1093 the United States Court of Appeals, District of Columbia Circuit found the District Court abused its discretion by refusing request for continuance and dismissing complaint.

In Trakas v. Quality Brands 759 F.2d 1093

the United States Court of Appeals District of Columbia Circuit found the District Court abused its discretion by refusing request for continuance and dismissing complaint.

In Poindexter v. Federal Bureau of Investigation the United States Court of Appeals District of Columbia Circuit reversed the trial judge in this case and discussed at length the difficulties of obtaining counsel in a contingency fee system (737 F.2d 1173).

In Powell v. Alabama 287 U.S. 68 the Supreme Court said:

> What then, does a hearing include? Historically and in practice, in our own country at least it has always included the right to the aid of counsel when desired and provided by the party asserting the right. the right to be heard would be in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. He is unfamiliar with the rules of evidence. If in any case, civil or criminal a state or federal court were to arbitrarily refuse to hear a party by counsel employed by and appearing for

> him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and therefore of due process in the constitutional sense.

In Forman v. Davis 371 U.S. 182 the Supreme Court said:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so require". This mandate is to be heeded... refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Plaintiff has standing to seek to seek an injunction requiring the Defendants to file with the court a plan to mitigate the hazard to the public resulting from the current operation of high pressure water mains and sewers in Farragut Square Park. This plan could include posting warning signs, periodic inspection and testing of trees in the vicinity of the high pressure water mains and sewers for rot, disease and stability and the maintenance of a written file on such

environmental activity; valving off the high pressure mains and diverting the water flow to other mains under the street, and other measures.

In Joseph v. District of Columbia 366 F. Supp. 757 (1973) the Court ordered the District to file with the court a plan for removal of trolley tracks which caused persons to lose control of their vehicles.

The Supreme Court has developed a three-prong model by which to assess standing, Allen, 468 U.S. at 751, (1) a "personal injury" that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and (3) which is "likely to be redressed by the requested relief."

CONCLUSION

Farragut Square Park, Washington D.C. is a 200 feet wide bucolic setting enjoyed by hundreds of office workers on a weekday and traversed by thousands of people who use its sidewalks and ride beneath the park on the Metro subway. Petitioner was seriously injured as he traversed the area surrounding the park. This park is arguably the most dangerous area of Washington D.C., with large diameter gas and water mains under foot and above the subway tube,which in addition to their explosive hazard cause the trees to be unstable. This hazard should be mitigated. The amendment filed by petitioner would place no burden on the

court. If the Court ruled, the public and the news media would ensure compliance with the Court's order.

The respondents took or were given by the court as much time as they desired to file court documents(e.g. respondents took five months to respond to petitioner's first interrogatory). A critical ruling promised by the court in February and necessary to petitioner obtaining legal representation issued in May. Petitioner's record was that of prompt response to court orders, and he never caused any delay except for one inadvertent error to which the court responded by dis-

missing his case with prejudice. Respondents opposed petitioners motion to obtain legal counsel, a right guaranteed by the Constitution. See Columbia Law Review, Vol. 66:1322.

The trial Judge in this case has been reversed at least three times on the issues presented in this case and has so far departed from the accepted and usual course of judicial proceedings. These actions, sanctioned by the Appeals Court call for an exercise of this Court's power of supervision.

Petitioner respectfully prays that this Court remand this case for trial on its merits and grant petitioner's motion to amend his complaint. The Public and petitioner have not had their day in Court.

APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992

No. 92-5317

John F. Joseph,
Plaintiff below, Appellee

v.

The District of Columbia, Office
of the Corporation Counsel,

v.

United States Dept of Interior
United States of America

BEFORE: Mikva, Chief Judge
Williams and Sentelle,
Circuit Judges

Upon consideration of the motions for summary affirmance and the opposition thereto, it is

ORDERED that the motions for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). Under the circumstances of this case, we conclude that dismissal was not an abuse of discretion; appellant failed to appear at trial after being informed that the trial date

would not be continued and never informed the court or the appellees of his intention not to appear, thereby disrupting the district court's calendar. See Shea v. Donohoe Construction Co., 795 F.2d 1071, 1075-76 (D.C. Cir. 1986). See also Wright v. Sargent, 869 F.2d 1175 (8th Cir. 1989) (affirming dismissal where, "[o]n the day of trial, [plaintiff] did not appear at the designated time, nor did he contact the court to explain his absence"). Although appellant, who proceeded pro se, was not warned by the district court of the possible dire consequences of his misconduct, we think it should have been obvious even to a pro se litigant that

failure to appear at one's own trial might result in dismissal with prejudice. We are not satisfied that there were "exceptional circumstances [which] might [have] require[d] the District Court to deal compassionately with [appellant's] . . . absence." Id. at 1076 n.4. Cf. Trakas v. Quality Brands Inc., 759 F.2d 185, 187 (D.C. Cir. 1985)

(plaintiff was unable to travel from St. Louis to Washington for the trial when "at the last minute [her] parents did not provide [a] loan"). No sanction short of dismissal with prejudice was appropriate, because a lesser penalty, such as the imposition of costs, expenses and attorneys' fees, would have allowed appellant to obtain the relief he had sought earlier (continuance of the trial) but was denied.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JOHN F. JOSEPH,

Plaintiff,

V. // Civil Action No. 91-2233

UNITED STATES OF AMERICA,
et al.,

Defendants.

O R D E R

Pending in this action are the petition of plaintiff for transfer to the Superior Court, and his motion for rehearing of the Court's denial of his motion to enlarge time within which to complete discovery and to continue the trial date. The

petition for transfer must be denied. Though third-party claims against the United States Department of Interior have been withdrawn, the United States remains a third-party defendant in this case. The motion for rehearing must be denied as well. The Court admonished plaintiff in November 1991 that should an attorney enter his or her appearance on plaintiff's behalf he or she would be bound to the existing trial schedule. Because plaintiff continues to request enlargement of the discovery period and continuance of the trial date in order to permit him to obtain counsel, his motion for rehearing must be denied.

Finally, trial in this action was scheduled to commence on July 13, 1992. On that date, defendant District of Columbia and third-party defendant United States appeared prepared for trial.

This preparation included having made arrangements for the appearance of expert and other witnesses. Plaintiff failed to appear for trial and failed to notify the Court that he would be unable to appear. Both the Court and the parties made efforts to contact plaintiff at his home and place of employment, but to no avail. In light of plaintiff's failure to appear, both the District of Columbia and the United States

moved to dismiss the action for failure to prosecute. Further, they asked that the dismissal be with prejudice in light of the costs and efforts of defendant and third-party defendant in preparing for trial and in order to prevent plaintiff from, in effect, obtaining the continuance he had been denied earlier. Based upon the oral motions of the parties and the entire record, the Court grants the motions for dismissal of this action with prejudice.

Accordingly, it is this 14th day of July, 1992,

ORDERED that the petition of plaintiff for transfer of this action to Superior Court be, and

hereby is, denied; it is further

ORDERED that the motion of plaintiff for rehearing of the Court's Order denying his motion to enlarge time for discovery and to continue the trial date be, and hereby is, denied; it is further

ORDERED that the motion of the District of Columbia to dismiss with prejudice for failure to prosecute be, and hereby is, granted; it is further

ORDERED that this case be, and hereby is, closed.

NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE

UNITED STATES COURTS OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992

N. 92-5317

John F. Joseph

Appellant

v.

The District of Columbia,
Office of the Corporation Counsel

Appellee

BEFORE: Mikva, Chief Judge;
Williams and Sentelle,
Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, filed April 16, 1993, it is
April 16, 1993, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY:

Robert A. Bonner
Deputy Clerk

APPENDIX D

Wayne M. Mansulla
Ashcraft & Gerel
Attorneys and Counsellors at Law
Suite 400
2000 L Street, NW
Washington, DC 20036

Mr. John Joseph
1327 Lockdale Road
Silver Spring, MD 20906

CERTIFIED MAIL

Dear Mr. Joseph:

This letter is to inform you that I will not be filing a lawsuit in regard to your accident of May 25, 1988. After a thorough investigation of this matter, I have reluctantly come to the conclusion that we have no viable claim against any party for negligence due to your accident of May 25, 1988. I am informing you at this time so that if you desire you will have plenty of time to obtain another attorney before the statute of limitations runs on May 25, 1991. If you obtain other counsel, I will certainly cooperate and supply them with all information I have in my file.

Please remember you must file a lawsuit by May 25, 1991 or you will not be able to pursue a claim.

Very truly yours,

Wayne M. Mansulla

WMM/mc

AMENDED COMPLAINT

This amended complaint incorporated all of the complaint filed on May 1, 1991, and adds the following prayer for relief to the relief requested in the May 1, 1991, filed complaint.

...an injunction ordering defendants to file with the court within 2 months of the final order in this case a plan for mitigating the hazard to pedestrians and traffic caused by the operation of high pressure water mains and sewers, and provides for inspection and maintenance of the trees in Farragut Square Park, and such other and further relief as to the Court may seem just and proper.

John F. Joseph

APPENDIX F

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN F. JOSEPH,

Plaintiff,

V. // Civil Action No. 91-2233

v.

DISTRICT OF COLUMBIA,

Defendant,

v.

UNITED STATES OF AMERICA, et al.,

Third-Party Defendants.

O R D E R

Upon consideration of the June 12, 1992, motion of plaintiff to enlarge time within which to

complete discovery and motion for continuance, the opposition thereto, and the entire record, it is this 25th day of June, 1992,

ORDERED that the motion of plaintiff be, and hereby is, denied.

NORMA HOLLOWAY JOHNSON

APPENDIX G

June 12, 1992

Keith Winston Watters
Keith Watters & Associates
Attorneys and Counsellors at Law
Commerce Building, Suite 302
1700 K Street, NW
Washington, DC 20006

Mr. John Joseph
1327 Lockdale Road
Silver Spring, MD 20906

Re: Joseph v. District of Columbia, et al.

Civil Action No.: 91-2233

Dear Mr. Joseph:

I have had an opportunity to consult with you regarding the above matter. As I have previously advised you, I have two matters previously scheduled on July 13, 1992. Therefore, I am unable at this time to enter an appearance

with the Court on your behalf.

However, if the Court grants your Motion to Enlarge the Time Within Which to Complete Discovery and Motion for a Continuance I will enter my appearance as your attorney of record in the above matter.

Please feel free to call me should you have any questions or care to discuss this matter in more detail.

Sincerely yours,

_____

Keith Winston Watters
UNITED STATES DISTRICT JUDGE